FILED
OCT 3
ALEXANDER L. STEVAS,
CLERK

No. 84-421

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT ROWLAND and
JOSEPH COSENTINO, M.D.,

Petitioners,

vs.

LEROY W. DEMERY, M.D.,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP
Attorney General of the State of California
NELSON KEMPSKY
Chief Deputy Attorney General
MARVIN GOLDSMITH
Assistant Attorney General
ROBERT H. FRANCIS
PAUL T. HAMMERNESS
Deputy Attorneys General

3580 Wilshire Boulevard
Suite 900
Los Angeles, California 90010
(213) 736-2084

Attorneys for Petitioners

19pp

No. 84-421

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT ROWLAND and
JOSEPH COSENTINO, M.D.,

Petitioners,

vs.

LEROY W. DEMERY, M.D.,

Respondent.

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

COME NOW Petitioners herein and file this Supplemental Appendix to their Petition for Writ of Certiorari, as follows:

1. The Judgment of the United States District Court for the Central District of California (entered July 8, 1982) dismissing the action with prejudice is attached hereto as Appendix "B".

2. The Order of the United States District Court for the Central District of

California (entered) July 8, 1982) adopting the findings, conclusions and recommendation of the United States Magistrate is attached hereto as Appendix "C".

3. The Final Report and Recommendation of the United States Magistrate (filed June 23, 1982) is attached hereto as Appendix "D".

4. The Report and Recommendation of the United States Magistrate Re: Motion to dismiss First Amended Complaint (filed May 12, 1982) is attached hereto as Appendix "E".

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
NELSON KEMPSKY,
Chief Deputy Attorney General
MARVIN GOLDSMITH,
Assistant Attorney General
ROBERT H. FRANCIS,
PAUL T. HAMMERNESS,
Deputy Attorneys General

By
PAUL T. HAMMERNESS
Deputy Attorney General

Attorneys for Petitioners

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT

APPENDIX B

JUDGMENT

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff, v. Lawrence Kupperman, et al., Defendants. No. CV 82-4922-Kn(B).

Entered: July 8, 1982.

Pursuant to the Order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

IT IS ADJUDGED that the complaint for restitution, civil penalties and other relief is dismissed with prejudice.

DATED: July 2, 1982.

(s) DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT

APPENDIX C

ORDER

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff v. Lawrence Kupperman, et al., Defendants. No. CV 81-4922-Kn(B).

Entered: July 8, 1982.

Pursuant to 28 U.S.C. §636(b)(1)(B), the Court has reviewed the pleadings and other papers herein and the attached Report and Recommendation of the Magistrate and adopts the Magistrate's findings, conclusions and recommendations.

IT IS ORDERED that Judgment be entered dismissing the complaint with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation and the Judgment by United States mail on the

plaintiff and the Attorney General for the State of California.

DATED: July 2, 1982.

(s) DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

APPENDIX D

FINAL REPORT AND RECOMMENDATION

OF UNITED STATES MAGISTRATE

APPENDIX D

FINAL REPORT AND RECOMMENDATION

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff v. Lawrence Kupperman, et al., Defendants. No. CV 81-4922-Kn(B).

Filed: June 23, 1982.

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable David V. Kenyon, United States District Judge, pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

On May 12, 1982, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and the Lodging of Proposed Judgment, which was served on the

parties together with copies of the Magistrate's Report and Recommendation.

On May 21, 1982, plaintiff timely filed his Objections to said Report and Recommendation. As requested by Minute Order dated May 28, 1982, respondent on June 11, 1982, filed Response to such Objections.

The said Report and Recommendation proposes that the action be dismissed with prejudice because plaintiff has not claimed that the defendants acted outside the scope of their employment, for which reason Government Code § 825 requires that damages, if any, be paid by the State of California. Under these circumstances, the Eleventh Amendment of the United States Constitution bars the action. Plaintiff objects that, because he pleaded that defendants' decision was "without any legal basis" (Amended Complaint, page 5, line 8),

defendants did act outside the scope of their employment. The contention is not logically sound. Further, and more important, the cases cited in the Response show that where, as here, the object to be accomplished is within a California state employee's express or implied authority, his act is deemed within the scope of his employment whether or not it is wrongful.

The Magistrate affirms and readopts his Report and Recommendation, proposing that the action be dismissed with prejudice.

DATED: June 12, 1982.

(s) VOLNEY V. BROWN, JR.
UNITED STATES MAGISTRATE

APPENDIX E

REPORT AND RECOMMENDATION RE:

MOTION TO DISMISS FIRST AMENDED COMPLAINT

OF UNITED STATES MAGISTRATE

APPENDIX E

REPORT AND RECOMMENDATION

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff v. Lawrence Kupperman, et al., Defendants.

No. CV 81-4922-Kn(B).

Filed: May 12, 1983.

This Report and Recommendation is submitted to the Honorable David V. Kenyon, United States District Judge, pursuant to the provisions of 28 U.S.C. §737 and the General Order 194 of the United States District Court for the Central District of California.

The California Board of Medical Quality Assurance (BMQA) disciplined plaintiff on August 31, 1977. (Complaint, Exhibit A). Under the BMQA Order, plaintiff's medical license was revoked until plaintiff

completed an approved six month medical educational curriculum course and passed an oral examination. Plaintiff was then to be placed on probation for five years during which time the execution of the order of revocation would be stayed. Plaintiff states that there was no six month medical exucation course available which would enable him to comply with the order, but this statement was contradicted by his testimony before this Court that he attended three months of an educational course prior to entering the state penitentiary. He contends that his attorney induced the BMQA to waive the education provision of the order, but does not document this claim. Plaintiff states he has been unable to renew his license since 1978 because the BMQA insisted on enforcing the order with respect to the six month

medical education curriculum.

Plaintiff seeks five million dollars in damages ("lost earnings, mental aggravation, and other damages to Dr. Demery and to his family.") (First Amended Complaint, p. 6) from defendants Robert Rowland, Executive Director of the BMQA, and Joseph Cosentino, M.D., Chief Medical Consultant to the Board. Plaintiff also seeks injunctive relief with respect to the BMQA but has not joined the Board as a defendant.

Defendants have moved to dismiss plaintiff's first amended complaint, arguing that the Eleventh Amendment bars suit against a state official in his individual capacity when the law requires that any damages awarded be paid from state funds.

Judicial interpretations have expanded the Eleventh Amendment prohibition against citizens suing foreign states to suits by

citizens against the state of their residence when that state does not consent to be sued. (Quern v. Jordan, 440 U.S. 332, 337 (1980); Parden v. Terminal Ry. of Alabama State Docks Dept. 377 U.S. 184, reh. denied, 377 U.S. 1010 (1964); Bracco v. Lackner 462 F.Supp. 436 (D.C. Cal. 1978).)

A recent Ninth Circuit opinion supports defendants' argument. In Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), the Court analyzed the applicability of the Eleventh Amendment to suits against state employees. The Court found no Eleventh Amendment bar to suits against the individual state employees named. Id. at 1350.[1/] In so doing, the Court took into account the fact that there

---

1. Plaintiff, however, was barred from suing the Athletic Director in his official capacity for vicarious liability for the acts of other defendants. Rutledge, supra, at 1350.

was no state law which required the state to pay any damages awarded against these defendants. Id. at 1350. The Court noted that the source from which plaintiff might be paid is the most important single factor in determining whether the Eleventh Amendment bars Federal jurisdiction. Id. at 1349. California law requires that the state pay any compensatory damages assessed against any state employee acting within the scope of his employment. Cal. Gov. Code §825.

Plaintiff has made no claim or showing that the defendants were acting outside the scope of their employment, nor has he sought punitive or exemplary damages. Cal. Gov. Code §825 consequently requires the State of California to pay any sums awarded plaintiff. Under the criteria set forth in Rutledge, supra, at 1349-1350, the Eleventh Amendment bars plaintiff's Federal suit

against defendants.

Cases cited by plaintiff in opposition to defendants' motion to dismiss are inapposite. In Perez v. Rodriguez Ban., 575 F.2d 21 (1st Cir. 1978), the defendant was found liable in his personal capacity. In Bertot v. School District No. 1, 613 F.2d 245 (10th Cir. 1979), plaintiff was seeking an award of backpay as part of an action for reinstatement, rather than damages from individual defendants. The Court has been unable to locate plaintiff's third case as cited, but notes that Rutledge is the most recent authority on point in this circuit.

IT IS THEREFORE RECOMMENDED that plaintiff's First Amended Complaint be dismissed with prejudice.

DATED: May 12, 1982.

(s) VOLNEY V. BROWN, JR.
UNITED STATES MAGISTRATE